

STATE OF MICHIGAN
COURT OF APPEALS

GRADCO, INC.,

Plaintiff-Appellant,

v

ZEBRA SKIMMERS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 21, 2017

No. 335650
Kent Circuit Court
LC No. 14-010049-CK

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

This case involves the sales representative commission act (SRCA), MCL 600.2961. Plaintiff appeals by right from the trial court's judgment, contending that the trial court erred in its findings of fact, conclusions of law, and verdict, and that the trial court should have granted its motion for reconsideration or, in the alternative, judgment notwithstanding the verdict. Plaintiff argues that the trial court incorrectly read into the parties' contract a commission cut-off provision that resulted in the trial court's incorrect damages award and denial of attorney fees as the "prevailing party" under the statute. We affirm in part, reverse in part, and remand.

Plaintiff, a manufacturer's representative, and defendant entered a contract in 1996 under which defendant agreed to pay plaintiff commissions for sales of its products. The parties' contract in relevant part stated:

Payment: 10% to you, remunerated immediately upon receipt of payment.

Cancellation: Either party, with at least 60 days notice.

The parties worked together for many years until at a meeting on April 28, 2014, defendant's founder, Steven Davidian, delivered to plaintiff's president, Bill Kerr, a letter dated April 25, 2014, that gave plaintiff notice that the parties' business relationship would formally terminate effective April 31, 2014. Davidian stated that plaintiff would receive 100% of its commissions for April, but that the commissions thereafter would taper in an unspecified amount for an unspecified number of months. Kerr read the letter and responded, "We know how to take care of choices like these," and "Don't let the door hit you on the way out." Davidian left the meeting and sent Kerr a letter dated April 29, 2014, declaring that because Kerr's statements violated defendant's code of ethical conduct, "all current relations will be terminated upon

payment of Gradco's April commissions." Defendant paid plaintiff its April 2014 commissions, but none thereafter.

Consequently, plaintiff sued alleging that defendant's failure to pay any commissions after April 2014 breached the parties' contract and that defendant intentionally refused to pay commissions due plaintiff in violation of MCL 600.2961. Plaintiff alleged generally that the amount in controversy exceeded \$25,000, and because it lacked certainty as to the amount of commissions owed, alleged that the due and unpaid commissions exceeded \$10,000. Plaintiff requested damages in the amount of the unpaid commissions, plus double damages under MCL 600.2961(5)(b), and attorney fees under MCL 600.2961(6).

After some skirmishes over discovery, the parties submitted competing motions for summary disposition. During the hearing on the summary disposition motions, the trial court and defense counsel discussed matters pertaining to the commissions and defenses raised by defendant. Their colloquy included the following:

Mr. Termaat: They stopped working. And, in fact, their calculation of those sales that reach \$18,000 are based on sales that somebody else made, not Gradco.

Court: Can I ask you a question? In terms of damages, are you and Mr. Moothart starting at the same number, but you get a much lower number because of tapering, or are you not even agreeing on the starting number? I thought it seemed like you were agreeing on the starting number.

Mr. Termaat: Yeah, if you're—by referring to the starting number, if you're talking about what the sales were for those months . . .

Court: Right.

Mr. Termaat: I think that's right.

Court: All right. So, in other words, there was approximately \$170,000 in sales. They want what they're going to get as their commissions is ten percent under the contract. You want to taper that down to everything for April, then 60 for May, then 30 for June, then you're out the door, right?

Mr. Termaat: Right. Right. But I think the starting number would be the same . . .

Court: All right. So the only . . .

Mr. Termaat: because the invoices are there, and we have evidence of what was paid.

Court: All right. Because, obviously, there's a significant difference between the two of you on the bottom-line number you get to, but you start at the same top-line number?

Mr. Termaat: Right. Right.

Court: He doesn't take the reductions, you take the tapering reductions, and that's the only difference?

Mr. Termaat: That's right.

Later in its ruling, the trial court summarized:

The payment term says ten percent to you remunerated immediately upon our receipt of payment, and I'm pleased to know that the parties have agreed on the top-line number, which is slightly over \$17,000. They disagree on the amount due because Mr. Termaat argues either it should be substantially reduced due to tapering or, perhaps, even zero based upon an alleged violation of this code of ethical conduct.

The trial court denied the parties' summary disposition motions because genuine issues of material fact existed. The trial court, therefore, held a two-day bench trial at which plaintiff contended that defendant breached the parties' contract and violated MCL 600.2961 by intentionally failing to pay commissions for May through September 2014 for sales made before the contract's cancellation date, roughly June 30, 2014, despite defendant's receipt of payments during May through September 2014. Defendant contended that the termination of the contract because of Kerr's violation of defendant's code of ethical conduct terminated defendant's obligation to pay any commissions after April 2014. Alternatively, defendant argued that if plaintiff were entitled to any commissions after April 2014, the commission-payment obligation ended 60 days following defendant's notice of termination and were subject to tapering under defendant's termination tapering policy.

Following the bench trial, the trial court entered its findings of fact, conclusions of law, and verdict, and separately entered a judgment in favor of plaintiff. The trial court found that the testimonial and documentary evidence established that defendant's code of ethical conduct spoke of generalities, and Kerr's remarks had not violated the code. The trial court also found that defendant imposed commission tapering on plaintiff on an *ad hoc* basis twice in the past, but defendant failed to prove by clear and convincing evidence that plaintiff agreed to tapering of commissions after termination of the parties' contract. The trial court held that defendant had no right to unilaterally deny plaintiff post-termination commissions, and nothing in defendant's code of ethical conduct authorized defendant to deny plaintiff post-termination commissions that were due under the parties' contract. The trial court ruled that defendant breached the parties' contract by failing to pay plaintiff commissions after April 2014. The trial court held that the parties' contract provided a 60-day post-termination period that obligated defendant to pay plaintiff commissions only to the end of the 60-day post-termination period. In its ruling, the trial court interpreted the contract's cancellation provision as follows:

Cancellation of the contract with 60 days' notice plainly refers to a complete severance of the parties' contractual relationship, as opposed to the mere commencement of a long winding-up process that could drag on for many months beyond the 60-day period.

Therefore, the trial court awarded plaintiff \$12,214.66 in unpaid sales commissions for May through June 2014 but none for July through September 2014. The trial court held that the evidence established that defendant intentionally failed to pay plaintiff the commissions it owed plaintiff; consequently, it augmented plaintiff's damages by awarding plaintiff an additional \$24,429.32 under MCL 600.2961(5)(b). The trial court declined to award plaintiff attorney fees as the "prevailing party" under MCL 600.2961(6) because at trial plaintiff sought a total of \$17,864.30 for unpaid commissions and was awarded less.

Plaintiff sought reconsideration, or alternatively, judgment notwithstanding the verdict on the several grounds including that defense counsel made a binding stipulation as to the unpaid commission amount during the hearing on the parties' motions for summary disposition and that the contract's cancellation term was not a commission payment obligation cut-off provision as held by the trial court. Plaintiff contended that plaintiff was entitled to all commissions for sales for which defendant received payment. Defendant argued that after it gave plaintiff the 60-days' notice, at the end of the 60 days, the contract was done, and commissions were cut off because the contract provided complete severance of the parties' contractual relationship. The trial court disagreed with plaintiff's analysis because hypothetically an April 2014 sale might never get paid or could get cancelled. The trial court stated that defendant would have to chase around a receivable from now until the end of time. Therefore, the trial court denied plaintiff's motion.

Plaintiff first argues that the trial court's findings of fact regarding the amount of commissions defendant owed were clearly erroneous because the parties stipulated to the amount of commissions at the summary disposition hearing, and, therefore, defendant was bound by that stipulation. We disagree.

We review for clear error a trial court's factual findings in a bench trial, and review de novo its conclusions of law. *Trahey v City of Inkster*, 311 Mich App 582, 593; 876 NW2d 582 (2015). Findings of fact are clearly erroneous where no evidentiary support exists or if this Court is left with a definite and firm conviction that a mistake has been made. *Id.* We review for an abuse of discretion a trial court's decision on a motion for reconsideration. *Frankenmuth Ins Co v Poll*, 311 Mich App 442, 445; 875 NW2d 250 (2015). We also review for an abuse of discretion the denial of a motion to amend judgment. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 381-382; 775 NW2d 618 (2009). We review de novo issues of statutory construction. *Frankenmuth Ins Co*, 311 Mich App at 445.

Stipulations entered in open court generally bind the parties. *Ypsilanti Charter Twp v Kirchner*, 281 Mich App 251, 270; 761 NW2d 761 (2008). "Stipulations of fact are binding, but stipulations of law are not binding." *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000) (citation omitted). "A 'stipulation' . . . is an agreement, admission or concession made in a judicial proceeding by the parties or their attorneys, respecting some matter incident thereto. Its purpose is generally stated to be the avoidance of delay, trouble, and expense." *Id.* "[A] statement made by a party or his counsel, in the course of trial, is considered a binding judicial admission if it is a distinct, formal, solemn admission made for the express purpose of, inter alia, dispensing with the formal proof of some fact at trial." *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969).

In this case, we conclude that defense counsel's responses to questions and statements the trial court made were not a distinct, formal, and solemn admission on behalf of defendant for the express purpose of dispensing with the formal proof of any fact at trial. *Ortega*, 382 Mich at 222-223. The record reflects that defendant maintained from the outset of the litigation that plaintiff was not entitled to any commissions after defendant's termination of the parties' business relationship by letter dated April 29, 2014. Defendant asserted alternative defenses to plaintiff's claims and contested the date on which its obligation to pay plaintiff commissions ended. Defendant never changed its position. Accordingly, we hold that the trial court correctly concluded that defendant made no binding stipulation on the record in open court.

Plaintiff next argues that the trial court erred by improperly construing and interpreting the contract's cancellation term as a commission obligation cut-off provision. We agree.

This case involved the proper construction and interpretation of the parties' contract. The language of a contract should be given its ordinary and plain meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). "Well-settled principles of contract interpretation require one to first look to a contract's plain language. If the plain language is clear, there can be only one reasonable interpretation of its meaning and, therefore, only one meaning the parties could reasonably expect to apply." *Singer v American States Ins*, 245 Mich App 370, 381 n 8; 631 NW2d 34 (2001). Moreover, where contract language is clear, its construction is a question of law for the court. *Ally Fin, Inc v State Treasurer*, 317 Mich App 316, 329; 894 NW2d 673 (2016). "If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Id.* (citation omitted).

When reading a contract, a court must "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468, 663 NW2d 447 (2003). "[P]arties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie*, 469 Mich at 51. This fundamental tenet precludes courts from rewriting an unambiguous contract based on the court's own assessment of reasonableness. *Rory v Continental Ins Co*, 473 Mich 457, 468-469; 703 NW2d 23 (2005).

In this case, the parties' contract stated two provisions that governed commission payment, notice of cancellation, and the effect of giving notice. The parties' contract plainly provided that either party could cancel the contract upon at least 60 days' notice. The cancellation provision, therefore, required at minimum a 60-day period from the time of notice to the contract's cancellation. We believe the cancellation provision had no ambiguity.

The plain language of the contract also required defendant's to pay plaintiff a 10% commission on sales after defendant received payments for such sales. Under MCL 600.2961(2), "The terms of the contract between the principal and sales representative shall determine when a commission becomes due." The parties' contract in this case clearly provides that commissions became due when defendant was paid. The contract expressed no exceptions or provisos to defendant's payment obligation. Like the cancellation provision, the commission

payment provision lacks ambiguity. Moreover, the payment provision and cancellation provision do not conflict. Read together, the parties could freely cancel their contract, but if either did, defendant remained obligated to pay commissions on sales for which payments were received.

The contract nowhere provided that cancellation otherwise impacted defendant's obligation to pay plaintiff commissions for sales it made, whether before notice of cancellation or after notice of cancellation during the 60-day period before the cancellation date. Accordingly, we hold that under the plain language of the contract, if plaintiff sold defendant's products before or during the 60-day period from the time of notice of cancellation to the contract's cancellation date, defendant remained obligated to pay commissions on sales for which defendant received payment regardless of when payments were received. We hold that the contract lacked an express commission payment cut-off provision.

The evidence at trial established that defendant owed plaintiff unpaid due commissions on payments defendant received during May through September 2014. The trial court incorrectly concluded that plaintiff could not recover commissions for payments received by defendant during July through September 2014, after the contract's cancellation date. The trial court erred by reading into the contract terms beyond the plain language of the parties' contract. The trial court's ruling rested on the hypothetical assumption that payments might stream in at some later date dragging out the winding-up process following the cancellation date when it should have enforced the parties' contract as written. Moreover, review de novo of the trial court record does not establish that defendant proved through clear and convincing evidence that plaintiff agreed to modify the parties' contract at any time to create a commission cut-off date.

MCL 600.2961(4) defines plaintiff's post-termination rights to commissions:

All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due.

In *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 164; 577 NW2d 206 (1998), this Court analyzed the purpose of MCL 600.2961 and concluded that the

text of the statute indicates that the Legislature intended to ensure that sales representatives are paid the commissions to which they are entitled, especially where those commissions come due after the termination of the employment relationship.

In this case, plaintiff's commissions came due when defendant received payments for sales made before termination of the contract. The parties' contract did not provide a cut-off date for payment of commissions. Under MCL 600.2961(4), defendant should have paid plaintiff all commissions after the cancellation date when it received the payments for the pre-termination sales or within 45 days thereafter. MCL 600.2961(4). Accordingly, the trial court erred by refusing to award plaintiff the commissions defendant was contractually obligated to

pay upon receipt of payment for sales before the cancellation date that were paid during July through September 2014.

Lastly, plaintiff argues that it prevailed in this case because it obtained judgment against defendant in excess of what it claimed as damages in its complaint despite recovering \$5,694.41 less than the \$17,864.30 it sought at trial. We agree.

MCL 600.2961(1)(c) defines the term “prevailing party” as “a party who wins on all the allegations of the complaint or on all of the responses to the complaint.” Further, MCL 600.2961(6) provides: “If a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs.”

In *Peters v Gunnell, Inc*, 253 Mich App 211; 655 NW2d 582 (2002), this Court addressed when a party was entitled to attorney fees under MCL 600.2961. It observed that the Legislature by inclusion of the word “all” in the definition of “prevailing party” severely limited when attorney fees could be awarded in cases brought under MCL 600.2961. *Id.* at 223. It concluded that “a party cannot be deemed a prevailing party entitled to reasonable attorney fees and court costs unless that party is found to have prevailed fully on each and every aspect of the claim or defense asserted under the SRCA.” *Id.* This Court rejected the defendant’s argument that the plaintiff was not a “prevailing party” because he alleged damages in his complaint in excess of \$25,000 but it was determined the actual amount of unpaid commissions was \$8,102.26. The plaintiff merely alleged the jurisdictional amount of the controversy, in excess of \$25,000, but not the actual amount of unpaid commissions. This Court concluded:

The fact that plaintiff is entitled to \$8,102.26 in actual damages is not dispositive of whether he prevailed on all aspects of his claim to the extent that he is entitled to an award of attorney fees and costs under MCL 600.2961(6). Plaintiff merely alleged that he was owed past-due commissions and that the amount in controversy exceeded \$25,000. When considering all the statutory grounds for relief under the SRCA, we conclude that plaintiff prevailed on his jurisdictional allegation as well as on his claim for past-due commissions. [*Id.* at 224.]

Plaintiff in this case similarly alleged in its complaint that the trial court had jurisdiction because its claim exceeded the jurisdictional amount. In its general allegations, plaintiff alleged that it was owed in excess of \$10,000 for unpaid commissions. Plaintiff’s allegations did not specify an exact amount of unpaid commissions that it was entitled to recover under the SRCA. In its prayer for relief, plaintiff did not specifically allege the amount of unpaid commissions that defendant owed but merely requested the award of damages in the amount owed.

Under *Peters*, plaintiff was a “prevailing party” as defined by MCL 600.2961(1)(c), which requires “win[ing] on all the allegations of the complaint[.]” The trial court ruled in favor of plaintiff on its claims and awarded plaintiff over \$2,000 more than plaintiff alleged in its complaint. Plaintiff was not required by MCL 600.2961(1)(c) to prevail on every argument made during trial because the statute required only that plaintiff prevail on the claims of the complaint. Further, because the trial court erred by rejecting plaintiff’s argument at trial that it was entitled to payment of commissions that came due during July through September 2014, the trial court erred by holding that plaintiff failed to prevail on all the allegations of the complaint.

We hold that, because plaintiff prevailed on all claims of the complaint, it was the “prevailing party” under MCL 600.2961(1)(c), and the trial court erred by not awarding plaintiff its costs and reasonable attorney fees under MCL 600.2961(6).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. As the prevailing party, plaintiff may tax its costs under MCR 7.219. We do not retain jurisdiction.

/s/ Brock A. Swartzle

/s/ David H. Sawyer

/s/ Jane E. Markey